87-668

No. ____

OCT 23 1987

JOSEPH F. SPANIOL, JR
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CHELSEA LABORATORIES, INC.,

Petitioner,

—vs.—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the due process rights of a party charged with unfair labor practices by the National Labor Relations Board are violated when the Board changes its theory of the violation subsequent to the issuance of a complaint and the Board fails to provide actual notice of its change of position to the charged party.

2. Whether the activities of an individual employee automatically become concerted and protected under Section 7 of the National Labor Relations Act when conducted in the presence of another employee.

3. Whether concerted activities in the absence of a collective bargaining relationship are entitled to receive the same degree of protection under Section 7 of the National Labor Relations Act as such activities which occur in the context of a bargaining relationship when such activities include abusive behavior.

4. Whether concerted activities in derogation of a collective bargaining representative which is still certified lose their protection under Section 7 of the National Labor Relations Act where the collective bargaining representative has lost a decertification election, to which objections have been filed and are still pending.

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—vs.—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Chelsea Laboratories, Inc., prays that a writ of certiorari issue to review the decision and order of the United States Court of Appeals for the Second Circuit enforcing an order of the National Labor Relations Board.

OPINIONS BELOW

The opinion of the court of appeals (App. A at 3a)[1] is reported at 825 F.2d 680 (2d Cir. 1987). The decision and order of the National Labor Relations Board (App. A at 11a) are reported at 282 NLRB No. 74 (1987).

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1 "App. A" and "App. B" refer to the appendices to this petition for certiorari. Appendix "A" contains the judgment and opinion of the court below, and the decision and order of the National Labor Relations Board and the Administrative Law Judge. Appendix "B" contains the relevant provisions of the National Labor Relations Act and the United States Constitution.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit enforcing the Board's order was entered on August 3, 1987. This petition is being filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1) and Section 10(f) of the National Labor Relations Act, as amended, 29 U.S.C. § 160.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Fifth Amendment of the United States Constitution and the National Labor Relations Act, as amended, Sections 7 and 8(a)(1), 29 U.S.C. § 157 and § 158 (a)(1), are set forth in Appendix B.

DISCLOSURE OF AFFILIATED COMPANIES

Petitioner is a wholly-owned subsidiary of Rugby Laboratories, Inc. which in turn is a wholly-owned subsidiary of Darby Drug Corp., both of which are located at 100 Banks Avenue, Rockville Centre, New York 11570. There are no other affiliated companies.

STATEMENT OF THE CASE

Petitioner was a party to a collective bargaining agreement with Local 918, International Brotherhood of Teamsters, Warehousemen and Chauffeurs of America, hereinafter called Local 918, from December 14, 1981 to December 13, 1984 covering a unit of Petitioner's production and maintenance employees.

On October 9, 1984, Jesus Velez, an employee of Petitioner, filed a decertification petition with the National Labor Relations Board seeking a secret ballot election among the employ-

ees of Petitioner to determine whether a majority of them desired Local 918 to continue to represent them for purposes of collective bargaining. Velez sought and obtained the assistance of Kismath Sooknanan, another employee, in his decertification attempt.

On November 30, 1984, a majority of the employees of Petitioner failed to vote in favor of Local 918 as their representative for the purposes of collective bargaining with Petitioner in an election conducted by the NLRB pursuant to the aforesaid petition.

On December 6, 1984, Local 918 filed a timely objection to conduct affecting the results of the election that was conducted by the Board.

On January 25, 1985, the Regional Director for Region 29 of the National Labor Relations Board issued a report on the objection, wherein he concluded that the objection to the conduct affecting the results of the election, filed by Local 918, lacked merit and recommended *inter alia*, that said objection be overruled and that a certification of results of the election be issued.

On February 6, 1985, Local 918 filed with the Board exceptions to the Regional Director's report on objections.

On February 15, 1985, while Local 918's exceptions to the report were still pending, Petitioner wrote a letter to its employees announcing that it would grant a fifty cent per hour wage increase.

On February 19, 1985, one of Petitioner's employees, Mary Giannone, approached Kismath Sooknanan, with a question about the employer's letter because she had heard rumors that the employees were not going to get an increase until a new union came in. Giannone was referring to rumors circulated by fellow employees that another union would be coming in. Sooknanan spoke to Jesus Velez, and asked him if he had gotten the February 15, 1985 letter. Velez said no and Sooknanan showed him the letter that was given to him by

Giannone. Velez then suggested they go speak to management to find out what was going on.

Velez and Sooknanan went into the office of Nat Getrajdman, the president of the company. Velez asked him about the letter. Getrajdman told Velez he was aware of the letter. Sooknanan reminded Getrajdman that he had promised to have a dialogue with employees before a decision was made on whether or not to recognize another union. Sooknanan interpreted the February 15 letter to mean that the company would not recognize another union. Getrajdman responded, "whatever the letter says, that is what is going to be." Then Sooknanan asked, "What are you trying to do, push things down people's throats?" Both parties raised their voices. Getrajdman told Sooknanan, "You cannot speak to me that way, I'm the President."

Getrajdman then told Sooknanan to leave the office and that he was fired.

On April 5, 1985, the Regional Director issued a complaint which alleged that several employees protested the granting of the wage increase while the exceptions were still pending (which presumably had the impact of undermining the still-certified collective bargaining representative, Local 918), and that Petitioner discharged its employee Kismath Sooknanan, because he participated in this protest in violation of Section 8(a)(1) of the National Labor Relations Act.

A hearing before Administrative Law Judge Eleanor MacDonald was held on October 28, 1985. At the hearing, contrary to the allegations of the complaint, Sooknanan testified that he did not participate in protesting the granting of a wage increase while exceptions were pending. As stated above, Sooknanan was an active proponent of Local 918's decertification. Rather, Sooknanan testified he protested the Company's failure to have a dialogue with employees before a decision was made whether or not to recognize another union.

On May 8, 1986, ALJ MacDonald issued her decision finding that Petitioner violated Section 8(a)(1) of the Act by discharging Sooknanan for engaging in concerted activities, based on a theory different from that alleged in the complaint. The Administrative Law Judge found that Sooknanan was protesting the failure of Respondent to keep its promise to have a dialogue prior to making a decision whether or not to recognize another union.

Petitioner filed exceptions with the Board alleging that the ALJ failed to give full consideration to the issues raised by Petitioner, misconstrued the record and the applicable law and exceeded her authority by finding a violation on a theory different from that articulated by General Counsel.[2] Petitioner in its exceptions further contended that the record did not support a finding that Sooknanan had engaged in concerted activities since he was only expressing his individual opinion when complaining about the alleged failure to have a dialogue. In any event, the activity would not be protected since, in effect, Sooknanan was seeking bargaining in derogation of the then-currently certified collective bargaining representative, Local 918. See, *Emporium Capwell Company* v. *Western Addition Community Organization*, 420 U.S. 50 (1975). Moreover, even if Sooknanan's protest constituted concerted activity, Sooknanan's behavior removed such activity from the protection of the Act inasmuch as he engaged in abusive and rude behavior to the president of the company which Petitioner was not required to tolerate.

The Board, in its decision dated December 22, 1986, decided to affirm the ALJ's rulings, findings and conclusions and to accept her recommended order. The Board rejected Petitioner's argument that the variance between the complaint's allegations and the judge's findings mandated dismissal of the complaint. However, the Board did not discuss Petitioner's other arguments: (1) that the conduct was not concerted; (2) that the conduct was not protected.

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2 Contrary to the assertion of the court of appeals, Petitioner filed exceptions to every material finding of fact made by the ALJ.

Accordingly, Petitioner refused to comply with the Board's order causing Respondent herein to seek enforcement.

The court of appeals on August 3, 1987, granted enforcement of the Board's order rejecting all of Petitioner's arguments. The court erroneously concluded that there was no due process violation since Petitioner had actual notice of the Board's theory of the violation as evidenced by its answer to the complaint. In fact, the answer which merely contained denials of the allegations in the complaint did not manifest any such knowledge. The court further concluded that Sooknanan's activities were concerted since they were conducted in the presence of the shop steward and in his capacity as a member of the employee committee. The court rejected Petitioner's *Emporium Capwell* argument concluding that Sooknanan was not seeking that Petitioner recognize the employee committee as "a full-fledged bargaining representative." Finally, the court erroneously concluded that Sooknanan's activities did not lose the protection of the Act by virtue of his rudeness and insubordination. The court noted that in a bargaining context, a certain amount of "salty language or defiance" is tolerated.

REASONS FOR GRANTING THE PETITION

1. Due Process Considerations

The decision below conflicts with decisions of the courts of appeals for the First, Sixth, Seventh, Eighth, Tenth and D.C. Circuits. Recently, in *NLRB* v. *Quality C.A.T.V., Inc.*, 824 F.2d 542 (7th Cir. 1987), the Seventh Circuit held that a decision of the NLRB that a company violated Section 8(a)(1) of the Act by discharging two employees for engaging in a concerted protest of "*uncomfortable*" working conditions violated the company's due process rights under the Fifth Amendment where the complaint alleged that that the company violated Section 8(a)(1) of the Act by discharging the employees for engaging in a concerted protest of "*unsafe*" working condi-

tions. The court noted that the complaint did not allege a violation based on a protest of "uncomfortable" working conditions and that the complaint was never amended to reflect a change from a "unsafe" working conditions theory to a "uncomfortable" working conditions theory. The General Counsel never raised an allegation concerning "uncomfortable" conditions at the evidentiary hearing, and the first mention the company ever received of a Section 8(a)(1) violation based on a theory of a protest of "uncomfortable" conditions was in the brief filed by the General Counsel with the Board.

In the instant case, the complaint alleged that Petitioner violated Section 8(a)(1) by discharging Sooknanan for engaging in a concerted protest of the granting of a wage increase while Local 918 was still certified. This theory clearly implied Sooknanan was acting on behalf of Local 918. The NLRB ultimately found that Petitioner violated Section 8(a)(1) by discharging Sooknanan for protesting its failure to honor its commitment to have a dialogue with employees prior to making a decision whether or not to recognize a union other than Local 918. Under this theory, Sooknanan was acting contrary to the interests of Local 918. As in *NLRB* v. *Quality C.A.T.V., Inc.*, *supra*, the complaint herein did not allege a violation based on a theory of a protest of the failure to have a dialogue. Moreover, the complaint was never amended to reflect this theory. The first mention Petitioner received of a Section 8(a)(1) charge on this theory was in the decision of the Administrative Law Judge.

The Second Circuit also considered the issue of adequate notice in an administrative proceeding in *NLRB* v. *Coca-Cola Bottling Co.*, 811 F.2d 82 (2d Cir. 1987). In *Coca-Cola*, the court of appeals held that the facts adduced at the hearing before the administrative law judge constituted a violation other than the violation which was charged in the complaint. The Court concluded that the uncharged violation could be found since all the issues surrounding the violation had been litigated fully and fairly even though the complaint had never been amended.

This approach by the Second Circuit stands in contrast to that of the other circuits, particularly the Seventh. The Seventh Circuit requires that a party receive actual notice prior to or at hearing and has a meaningful opportunity to prepare his defense. Thus, in *NLRB* v. *Complas Industries, Inc.*, 714 F.2d 729 (7th Cir. 1983), the court held the employer was denied due process under the Fifth Amendment when the NLRB was allowed to amend its original complaint to include an additional allegation where the original complaint did not give any indication of such a claim. Similarly, in *Soule Glass and Glazing Co.* v. *NLRB*, 652 F.2d 1055 (1st Cir. 1981), the First Circuit concluded that unfair labor practice findings against the company were violative of due process where these violations were not charged in the General Counsel's amended complaint. In that case, the court held that due process prohibited the judge from gratuitously injecting new issues into the case and deciding them *sua sponte*. In *NLRB* v. *Homemaker Shops*, 724 F.2d 535 (6th Cir. 1984), the Sixth Circuit found a variance violated due process where the company counsel had received notice of the new claim only a few days *before* the hearing. In *Stokely-Van Corp, Inc.* v. *NLRB*, 722 F.2d 1324 (7th Cir. 1983), this court held that a due process violation occurred when the respondent company was first informed of the differing charge in the General Counsel's post-hearing brief. See also *NLRB* v. *Blake Construction Co., Inc.*, 663 F.2d 272 (D.C. Cir. 1981); *NLRB* v. *Pepsi-Cola Bottling Co.*, 613 F.2d 267 (10th Cir. 1980); *Drug Package, Inc.* v. *NLRB*, 570 F.2d 1340 (8th Cir. 1978); *Rodale Press, Inc.* v. *FTC*, 407 F.2d 1252 (D.C. Cir. 1968) in which cases due process violations were found.

Petitioner urges that the Court grant its petition herein so that this divergence among the circuit courts may be reconciled. It is apparent from the numerous cases cited above that the issue of the NLRB amending its complaint or its theory of the case at the last minute, in hearing or even post-hearing, is an issue which arises again and again. The expedience and efficiency of administrative agency proceedings will not be

compromised by establishing a requirement that such agencies provide actual, prior notice of the allegations against respondents. For example, in the instant case, there was no reason why the General Counsel should not have been required to amend the complaint prior to the hearing. Unless the Supreme Court adopts the stricter approach of the Seventh Circuit, the NLRB will continue to abuse its status as an administrative agency to derive an advantage in litigation.

2. The Definition of Concerted Activity

The Second Circuit's interpretation of concerted activities in the instant case is in conflict with the decision of this Court in *NLRB* v. *City Disposal Systems*, 465 U.S. 822 (1984). In *City Disposal*, this Court addressed the issue of whether an individual employee's invocation of a right contained in a collective bargaining agreement constituted concerted activity within the meaning of Section 7. In concluding that such conduct was in fact concerted, this Court noted that the critical factor in determining whether such conduct is concerted is to elucidate "the precise manner in which particular actions of an individual employee must be linked to the actions of fellow employees in order to permit it to be said that the individual is engaged in concerted activity." This Court noted that at some point an individual employee's actions may become so remotely related to the activities of fellow employees that it cannot reasonably be said that the employee is engaged in concerted activity, citing approvingly, the Board decision in *Capital Ornamental Concrete Specialties, Inc.*, 248 NLRB 851 (1980), which held that if an employer were to dicharge an employee for purely personal "griping," the employee could not claim the protection of Section 7. See also *NLRB v. Pelton Casteel, Inc.*, 627 F.2d 23 (7th Cir. 1980).

This Court also distinguished the issue before it in *City Disposal* from that resolved by the Board in *Meyers Industries*, 268 NLRB 493 (1984). In *Meyers*, the Board held that where there is a collective bargaining agreement, an employee's assertion of a right that can only be presumed to be of interest to

other employees is not concerted activity. Thus, in *Meyers*, the Board held that in order for the General Counsel to meet its burden of establishing that the employee's activity is concerted it must show that the employee was engaged in with or on the authority of other employees and not solely by and on behalf of the employee himself.

Petitioner submits that Sookanan's conduct constituted personal griping and did not meet the definition of concerted activities under Section 7 of the Act as defined by *Meyers Industries*, *supra*. Even assuming *arguendo* that Sooknanan may have originally come into Getrajdman's office to obtain clarification of the letter and assuming further that that conduct may have been considered concerted, Sooknanan's conduct, even then, ceased to be concerted once he obtained the requested clarification and began to express his *personal* opinion that the granting of the wage increase constituted a break in the promise to have a "dialogue" before recognizing another union.

When Velez asked Getrajdman about the letter, Getrajdman clarified the fact that the employees would be receiving a raise. *Sooknanan admitted that, at this point, there was no question in his mind that he would be getting a raise.*

There was no evidence that anyone, other than Sooknanan, believed that the granting of the wage increase was inconsistent with the promise of a "dialogue" before recognizing another union. In fact, Giannone testified that she had no objection that the wage increase was announced without first consulting the employee committee.

Nevertheless, the ALJ found that it was "manifest" that Sooknanan was engaged in concerted activities without any analysis or explanation. Despite the inadequacies of the ALJ decision in this regard, the Board failed to address Respondent's exceptions on this point.

The court of appeals did address the concerted activity issue concluding that Sooknanan's conduct was concerted inasmuch as it was done in the presence of Velez and he was acting on behalf of other employees as a member of the employee negotiating committee.

Petitioner submits that the mere fact that Sooknanan was in the presence of another employee when he expressed his personal complaint about the "broken promise" did not automatically render his activity concerted. Velez went to see Getrajdman to obtain clarification of the February 15th letter. However, after such clarification was obtained, Velez was silent. There was no evidence that Velez shared Sooknanan's viewpoint regarding the "broken promise." Petitioner submits that pursuant to *Meyers Industries*, *supra*, General Counsel had the burden of establishing that Sooknanan was also speaking on behalf of Velez or some other employee. General Counsel clearly failed to meet this burden. As noted above, Sooknanan was clearly not speaking on behalf of Giannone in this regard. Accordingly, General Counsel failed to meet its burden of establishing that Sooknanan was engaged in concerted activities.

Moreover, the fact that Sooknanan was a member of the employee committee did not render his conduct concerted. There was no evidence in the record that as a member of the employee committee he was authorized to present independently without the consent or approval of any other employee grievances on their behalf. As stated above, there was no evidence that any other employee shared Sooknanan's viewpoint concerning the broken promise or authorized his complaint in this regard.

The Second Circuit, in this regard, failed to distinguish between the law applicable in a *City Disposal* situation where there is a collective bargaining relationship and the *Meyers* situation where there is not. In the instant case, Sooknanan's complaint did not arise under the collective bargaining agreement. Thus, it is not automatically considered concerted activ-

ity even if the conduct can be presumed to be of interest to other employees. Under *Meyers*, General Counsel had to show that the conduct was engaged in with or on the authority of other employees.

Petitioner urges that its petition for a writ of certiorari be granted on this issue so that guidelines may be established for determining the existence of concerted activity in situations where there is no collective bargaining relationship. Employers without the structure of a collective bargaining agreement especially need guidance in order to ascertain when individual conduct becomes concerted.

3. The Degree of Protection Under Section 7

Even if Sooknanan's activity is deemed to be concerted, it is not automatically protected under Section 7 of the Act. In *NLRB* v. *City Disposal*, *supra*, this Court held:

> The fact that an activity is concerted, however, does not mean that an employee may engage in concerted activity in such an abusive manner that he loses the protection of Section 7.

465 U.S. at 837.

The Court of Appeals rejected Petitioner's argument that Sooknanan was discharged for rudeness and insubordination stating:

> In the bargaining context, we have held that "[a]n employee is protected by Section 7 in her good faith, albeit impulsive, conduct . . . A certain amount of salty language or defiance will be tolerated." (App. A. at 8a).

Sooknanan admitted that he accused Getrajdman of trying "to push things down people's throats" and yelling at him.

The Board concluded and the Second Circuit agreed that this conduct was not so opprobrious as to warrant the denial of the protection of Section 7 of the Act. However, Petitioner submits that the Board and the Court of Appeals mistakenly applied

the standard which is applicable in a bargaining context to the instant situation.

A certain degree of latitude is given to shop stewards who may lose their temper in the give-and-take of the recognized collective bargaining process. However, there is no reason why the same degree of protection should be given to employees who raise grievances independently or in derogation of the collective bargaining relationship. In the instant case, Sooknanan requested a meeting with Getrajdman. Sooknanan did not have a legal obligation to grieve as a union would in order to meet its duty of fair representation.

Petitioner submits that the court of appeal's interpretation of Section 7 of the Act is exceedingly broad. Unless further limits are placed on the degree of protection conferred by Section 7, the degree of control needed by companies to manage the workplace could be destroyed. While there may be justification to extend such protection to shop stewards in a bargaining context, there is none in the instant case where Sooknanan acted in derogation of the certified collective bargaining representative. Petitioner submits that in even a non-unionized setting there is no need to insulate employees from a requirement that they present their grievances in a non-abusive manner.[3]

Petitioner urges that certiorari be granted on this issue so that a proper balance between the rights of employers to maintain discipline and the rights of employees can be struck.

4. The Applicability of *Emporium-Capwell*

The court of appeals held that *Emporium-Capwell* did not apply herein since Sooknanan's request for a dialogue was not a demand that Chelsea recognize the employee committee as a

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3 Unionized employees also enjoy greater Section 7 rights pursuant to *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975) which provides that unionized employees have the right to request union representation at investigatory interviews. However, non-unionized employees do not possess an equivalent right to request representation. *Sears and Roebuck & Co.*, 274 NLRB 230 (1985).

full-fledged bargaining representative. The court concluded that Sooknanan's conduct which was intended to pave the way for a new union local, was not destructive of the old union, and, thus, was deserving of the protection of Section 7 of the Act, even under *Emporium-Capwell.*

Petitioner submits that the court of appeals failed to interpret *Emporium-Capwell* correctly. In that case, this Court concluded that minority employees who by-passed the contractual grievance machinery and sought to present their grievances independently through picketing and leafletting were not engaged in protected activity under Section 7 of the National Labor Relations Act, even though such conduct would be considered protected where there was no collective bargaining relationship. In *Emporium-Capwell*, the employees sought to bargain directly with their employer only concerning the elimination of racially discriminatory employment practices. They did not demand status as a "full-fledged" bargaining representative.

Petitioner submits that *Emporium-Capwell* does not contain any exception where the attempt to bargain directly is meant to pave the way for a new bargaining representative. Petitioner concedes that in some cases, the concerted activities of employees to organize a new union are protected even where the incumbent union has not been decertified. However, if employees demand bargaining before decertification, as in the instant case, such activity is clearly destructive of the collective bargaining process and encompassed by *Emporium-Capwell* and is not protected by Section 7.[4]

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4 Petitioner has argued *supra* that Sooknanan was acting alone when he protested the failure to have a dialogue. The court of appeals rejected this argument on the basis that Sooknanan was acting on behalf of the employee committee. However, if Sooknanan were acting on behalf of the employee committee or on behalf of a new local, it is beyond dispute he was acting in derogation of Local 918. The decision of the court of appeals is inherently inconsistent insofar as it holds that Sooknanan was not acting alone but was not acting in derogation of Local 918.

In the instant case, the incumbent union had lost the decertification election but was not yet officially decertified since objections to the election were still pending. Accordingly, at the time the incident occurred, it was still possible that the incumbent would continue as the collective bargaining representative.

Petitioner submits that the Second Circuit's interpretation of *Emporium-Capwell* erodes the time-honored concept of majority rule in federal labor relations. See *Allied Chemical Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971); *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967); *Wallace Corp.* v. *NLRB* 323 U.S. 248 (1948). Moreover, it creates uncertainty among employers who are now put in the position of being forced to guess when minority employee conduct is protected or unprotected. Therefore, Petitioner prays that certiorari be granted on this issue.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

Judgment of the Court

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Filed Aug 3, 1987]

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the third day of August, one thousand nine hundred and eighty-seven.

Present:

HON. J. EDWARD LUMBARD,
HON. RICHARD J. CARDAMONE,
HON. LAWRENCE W. PIERCE,
Circuit Judges.

Docket No. 87-4022

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

—v—

CHELSEA LABORATORIES, INC.,
Respondent.

An application for an enforcement of an order of the National Labor Relations Board.

This cause came on to be heard on a certified list of items comprising the record of the National Labor Relations Board and was argued by counsel.

Upon consideration thereof, it is hereby ORDERED, adjudged and decreed that the application for enforcement of said order be and it hereby is granted, and the Board's order is enforced in accordance with the opinion of this court with costs to be taxed against the respondent.

ELAINE B. GOLDSMITH, *Clerk*

/s/ EDWARD J. GUARDARO
By: Edward J. Guardaro
Deputy Clerk

A TRUE COPY

Elaine B. Goldsmith

/s/ ELAINE B. GOLDSMITH, *Clerk*

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1287—August Term 1986

(Argued June 26, 1987 Decided August 3, 1987)

Docket No. 87-4022

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

—v.—

CHELSEA LABORATORIES, INC.,

Respondent.

Before:

LUMBARD, CARDAMONE, and PIERCE,

Circuit Judges

The National Labor Relations Board seeks enforcement of an order it issued against Chelsea Laboratories, Inc.,

for a violation of § 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) (1982).

Enforcement granted.

MARTIN GRINGER, Hewlett, New York (Milman, Naness & Pollack, Hewlett, New York, of counsel), *for Respondent*.

GORDON SCOTT, Attorney, National Labor Relations Board, Washington, D.C. (W. Christian Schumann, Supervisory Attorney; Rosemary M. Collyer, General Counsel; John E. Higgins, Jr., Deputy General Counsel; Robert E. Allen, Associate General Counsel; Elliott Moore, Deputy Associate General Counsel; National Labor Relations Board, Washington, D.C., of counsel), *for Petitioner*.

CARDAMONE, *Circuit Judge*:

This application is brought by the National Labor Relations Board (Board) for enforcement of its unfair labor practice order issued against Chelsea Laboratories, Inc. ("respondent", "Chelsea Labs", or "employer"). The Board, in an opinion reported at 282 NLRB No. 74 (1986), found that respondent had violated § 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1)

(1982), by discharging an employee engaged in protected concerted activity. The Board's action raises a novel question: whether the concerted activity of employees promoting a new union is protected even though the old union has not yet been officially decertified. We conclude that it is and grant enforcement.

I

The Board made the following findings of fact. Respondent's employees were represented by Local 918 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Local 918). On October 9, 1984 Jose Velez, the shop steward, filed a decertification petition. A decertification election was held on November 30, 1984, at which Kismath Sooknanan, a member of Local 918's employee negotiating committee, served as Velez's observer. A majority of the employees voted to decertify Local 918.

Several months later, while objections to the election were still pending, Chelsea Labs sent its employees a letter thanking them for rejecting union representation, informing them that they would receive a wage increase retroactive to December 1984, and explaining their eligibility to participate in a new profit sharing plan. The employees also were congratulated in the letter for "deciding to join the over eighty (80%) percent of the workforce . . . that is non-union." Another employee asked Sooknanan about the letter, inquiring specifically whether a new local was coming in or whether the company was going non-union. This employee expressed her belief that there would be no wage increase until the still pending decertification process was completed.

Sooknanan, who shared her view about the raise, was concerned because Chelsea Labs' president had earlier told him that there would be "a dialogue" before a decision was made to recognize a new local. Therefore, together with shop steward Velez, Sooknanan went to see the employer's president, Getrajdman, to question him about the letter. At the meeting, Sooknanan asked about the raise and the promised "dialogue." Getrajdman responded that: "Whatever the letter says, that is what is going to be." Sooknanan replied, "What are you trying to do, push things down people's throats?" During the ensuing discussion both parties apparently raised their voices and Getrajdman told Sooknanan, "You cannot speak to me that way, I'm the President." He then fired Sooknanan and ordered him out of the office. The Board concluded that Sooknanan's discharge was an unfair labor practice and ordered the employer to reinstate him and to make him whole for any loss of earnings or other benefits.

II

Respondent challenges the Board's order on several grounds. It contends first that the Board's complaint did not give reasonable notice of the theory eventually accepted by the administrative law judge. The Board alleged in its complaint that Sooknanan was discharged for objecting to the employer's offer of a raise while the decertification process was continuing. At the hearing before the ALJ it became clear that Sooknanan was an advocate for a new union local and that he went to Getrajdman to object to the raise without the promised "dialogue" respecting the recognition of a new local. To

Sooknanan, the raise indicated that respondent had decided not to recognize the new local. The ALJ found that Sooknanan was discharged for bringing this complaint and that such a discharge was an unfair labor practice. Chelsea Labs argues that the ALJ's finding was based on a theory not contained in the complaint.

In order to find an unfair labor practice, the Board must afford an alleged violator notice and an opportunity for a hearing. In *N.L.R.B. v. Coca Cola Bottling Co. of Buffalo, Inc.*, 811 F.2d 82 (2d Cir. 1987), we had occasion recently to address the problem of "those cases where the facts adduced at the hearing before the ALJ fit a violation other than as charged in the complaint." *Id.* at 87. An "uncharged violation may only be found by the ALJ if all issues surrounding the violation have been litigated fully and fairly." *Id.* Here, the employer asserts that it did not have the opportunity to question either the factual or legal issues underlying the ALJ's finding of a violation. We disagree.

Chelsea Labs demonstrated its awareness of the "dialogue" theory. It addressed the legal issues as early as its first answer to the NLRB's complaint. Its claim that if it had notice it would have been able to challenge the factual predicate of the "dialogue" theory—that the employer had actually promised a dialogue—also fails. It is not clear that the claim of an unfair labor practice would be unavailing, even were there no promise of a dialogue. *See N.L.R.B. v. Clayton Construction Corp.*, 652 F.2d 6, 8 (8th Cir. 1981) (per curiam) (mere inquiry to employer about job assignment protected even when incorrect). Further, respondent did not object to the ALJ's factual findings on review before the Board, and, absent extraordinary circumstances, a party may not urge in this Court

objections not made before the Board. 29 U.S.C. § 160(e) (1982).

The employer also contends that Sooknanan was discharged for rudeness and insubordination. In the bargaining context, we have held that "[a]n employee is protected by § 7 in her good faith, albeit impulsive, conduct. . . . A certain amount of salty language or defiance will be tolerated." *American Telephone & Telegraph Co. v. N.L.R.B.*, 521 F.2d 1159, 1161 (2d Cir. 1975). *See also Clayton Construction Corp.*, 652 F.2d at 8 (mere inquires do not constitute insubordination meriting discharge). The responsibility for balancing the employee's conduct against an employer's ability to maintain order "rests with the Board, whose decision, if supported by substantial evidence, will not be disturbed unless it is arbitrary or illogical." *American Telephone & Telegraph Co.*, 521 F.2d at 1161. We see no reason to disturb the Board's finding on this account.

Respondent's third claim is that Sooknanan's meeting with Getrajdman was not concerted activity because Sooknanan was only expressing his own individual concern regarding the promised dialogue. On the contrary, the record makes clear that Sooknanan was accompanied to this meeting by shop steward Velez and was acting on behalf of other employees as a member of the employee negotiating committee. His inquiry is not therefore rendered "unconcerted", as the employer claims, simply because the employee who discussed the letter with Sooknanan may not have been aware that Chelsea Labs had promised to conduct a dialogue before granting a raise. *See Meyers Industries, Inc.*, 268 NLRB 493, 497 (1984) ("In general, to find an employee's activity to be 'concerted,' we shall require that it be engaged in with or

on the authority of other employees . . . ."), *rev'd sub nom., Prill v. Meyers Industries, Inc.*, 755 F.2d 941 (D.C. Cir.), *cert. denied*, 106 S. Ct. 313 (1985).

Finally, the respondent's principal contention is that Sooknanan's activity, even if concerted, was not protected because Sooknanan's request for a dialogue was an attempt to undermine the existing collective bargaining representative. The employer relies on *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50 (1975), in which the Supreme Court ruled that minority employees who repudiated a contractual grievance mechanism and sought to compel separate bargaining by exerting economic pressure through picketing and leafletting were not engaged in protected activity under § 7 of the National Labor Relations Act. *Id.* at 69-70.

We begin by observing that if Local 918 had been officially decertified at the time of Sooknanan's request for the promised dialogue, it would be clear that this activity was protected. Sooknanan's protest to Getrajdman expressed a concern which went to the very heart of section 7—that is, whether the company was going to recognize a new union local as the employees' collective bargaining representative. Sooknanan need not be acting on behalf of a union or an otherwise formally organized group. We have long held that concerted activity is protected under § 7 where the employees are simply acting together for mutual aid. *N.L.R.B. v. Pratt & Whitney Air Craft Division, United Technologies Corp.*, 789 F.2d 121, 127 (2d Cir. 1986); *N.L.R.B. v. Columbia University*, 541 F.2d 922, 931 (2d Cir. 1976).

Respondent's argument that *Emporium Capwell* somehow requires a different result because the old union had

not yet been decertified is not persuasive. *Emporium Capwell* did not place all activity aimed at replacing the existing union outside of § 7's protection. Rather, *Emporium Capwell* withdrew § 7 protection from activities which are destructive to the collective bargaining process. *See* 420 U.S. at 69-70.

These concerns are not implicated here. Sooknanan's request for a dialogue was not a demand that Chelsea Labs recognize the employee committee as a full-fledged bargaining representative. Rather, he was merely insisting that the employer adhere to its promise to talk with the employees about a new local, after the prior local's decertification process was complete. Nor does Chelsea Labs claim that Sooknanan's activities were inconsistent with the existing grievance mechanism. In short, Sooknanan's conduct that was intended to pave the way for a new union local and which was clearly not destructive of the old union, is deserving of § 7's protection, even under *Emporium Capwell*.

III

Accordingly, for the reasons stated above, the NLRB's petition for enforcement is granted.

Decision and Order of the National Labor Relations Board

282 NLRB No. 74

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Case 29-CA-11697

CHELSEA LABORATORIES, INC.

and

KISMATH SOOKNANAN, an Individual

DECISION AND ORDER

On 8 May 1986 Administrative Law Judge Eleanor MacDonald issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.

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1 The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent contends that the judge found that the Respondent had violated the Act on a theory of protected concerted activity other than the theory alleged in the complaint. It argues that this variance between the complaint allegations and the judge's findings warrants dismissal of the complaint. We find no merit to the Respondent's contentions for the following reasons.

The pertinent facts, as found by the judge and which are not in dispute, show that in September 1984 Teamsters Local 918 was the certified bargaining representative of the Respondent's employees. On 9 October 1984, following a discussion with a committee of employees, including Charging Party Sooknanan, who were dissatisfied with the conduct of Local 918, employee shop steward Velez filed a decertification petition. In the resulting decertification election held 30 November 1984, a majority of employees voted against continued representation by Local 918. Election objections, timely filed first with the Regional Director and subsequently with the Board, were pending at the time of the following events.[2]

After the election, the employees received a letter, dated 7 December 1984, from the Company, thanking them for rejecting union representation, giving them insurance coverage, and promising additional information on a future wage increase. Also sometime in December, a dispute arose between the Respondent's president Getrajdman and employees concerning overtime work. Sooknanan and Velez approached the Respondent's vice president and offered to help resolve the dispute. At the same time, Sooknanan and Velez asked the vice president if the Company would recognize Local 815, another Teamsters Local, once Local 918 was decertified.[3] The vice president promised to bring this request to the Respondent's board of directors. Sooknanan and Velez then met with employees and

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2 The Board certified the results of the election on 12 March 1985.

3 Record testimony shows that prior to the decertification election an unspecified number of employees had signed cards in support of Local 815 and had given them to Velez. There is, however, no showing that a request for recognition, based on a showing of employee support, was made at any relevant time.

persuaded them to do the overtime work, telling them to have patience until the decertification of Local 918 was completed and Local 815 could begin representing them. Subsequently, in December 1984, the employee committee approached Getrajdman about their request regarding the recognition of Local 815. Getrajdman indicated he could not give an answer but promised there would be a "dialogue" before any decision was made. Sooknanan also indicated the employees were dissatisfied because they had not gotten the promised wage increase. Later that day, Velez and Sooknanan met with employees and related their conversation with Getrajdman. Several days later, Sooknanan individually approached Getrajdman, indicating that employees were dissatisfied with Local 918 and that Sooknanan had become involved in the situation in an effort to help the people.

In early February 1985, Sooknanan asked Getrajdman about rumors that the pending election objections had been overruled. Getrajdman indicated that he had no knowledge as to the status of the objections and promised to get back to Sooknanan. Several days later, the Respondent's production manager informed a group of approximately eight employees, including Sooknanan, that Local 918 had filed an appeal with the Board regarding the Regional Director's recommendation that the objections be overruled and that there would be no raise until this appeal was decided. By letter dated 15 February 1985, however, the Respondent informed the employees that they would receive a wage increase, effective 22 February 1985, and retroactive to December 1984. Additionally, the letter informed employees that, effective immediately, they would become participants in the company group profit-sharing plan and that all current working conditions such as holidays, vacations, sick leave, and seniority would remain in effect. The letter further expressed the Company's appreciation to employees for deciding to join the percentage of the work force in the United States that is nonunion. On 19 February 1985 Sooknanan was approached at work by an employee who showed him a copy of the 15 February letter and who asked him to explain the apparent conflict between the Respondent's

statement that there would be no raise until the Board reached a decision on the election objections and the 15 February letter granting, inter alia, a wage increase to employees. The employee also indicated to Sooknanan that she thought no increase would be given until the decertification proceeding was over and that she wondered whether this meant that Local 918 was out, Local 815 was in, or if the Company was going nonunion. Sooknanan then went to Velez with the letter, and together they went to see Getrajdman. During the ensuing discussion as to the contents of the letter and their meaning, Sooknanan asked Getrajdman about the promised dialogue. Getrajdman and Sooknanan became involved in an argument which resulted in Sooknanan's discharge.

The complaint alleged that Sooknanan was discharged for protesting the Respondent's grant of a wage increase on 15 February 1985, while objections to the decertification election were pending. During the hearing, Sooknanan's testimony clearly revealed that his 19 February protest was not directed toward the Respondent's grant of a wage increase because election objections were pending. Rather, the testimony revealed that the protest, which came in response to the 15 February letter, concerned what, to Sooknanan and other employees, represented a decision by the Respondent to renege on its earlier promise to hold a dialogue with employees before deciding whether to recognize another local. These facts, which provide the basis for the judge's finding that Sooknanan was engaged in protected concerted activity at the time he was discharged, were fully litigated at the hearing. While all the facts were not specifically alleged in the complaint, we nonetheless find it inaccurate to say that the theory as to the protected concerted nature of Sooknanan's protest is not encompassed by the complaint, particularly where the complaint allegations placed the Respondent on notice that the announcement of the wage increase in the 15 February letter was the genesis of Sooknanan's protest and that the 15 February letter and 19 February conversation were the focus of the General Counsel's case.

The Respondent does not now claim that it was precluded from presenting exculpatory evidence, nor does it argue that it would have altered the conduct of its case at the hearing in any particular. Further, although the Respondent now claims it had no notice of the specific basis for the violation found, the brief before us addresses the law and the sufficiency of the facts now contained in the record with respect to the protected concerted nature of Sooknanan's protest of the Respondent's breach of promise regarding the dialogue. Accordingly, as we find that the theory was encompassed in the complaint and that all the operative facts underlying the 8(a)(1) finding are present in the record, we shall reject the Respondent's argument that variance provides a basis for dismissal in this case. See, e.g., *Baytown Sun*, 255 NLRB 154 fn. 1 (1981); *George C. Foss Co. v. NLRB*, 752 F.2d 1407 (9th Cir. 1985).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Chelsea Laboratories, Inc., Inwood, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.[4]

1. Substitute the following for paragraph 2(b).

> "(b) Remove from its files any reference to the unlawful discharge and notify the employee in writing that this has been done and that the discharge will not be used against him in any way."

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4 The modified Order corrects certain inadvertent errors contained in the recommended Order.

2. Substitute the attached notice for that of the administrative law judge.[5]

Dated, Washington, D.C.
22 December 1986

Donald L. Dotson, *Chairman*

Marshall B. Babson, *Member*

James M. Stephens, *Member*

NATIONAL LABOR RELATIONS BOARD

(SEAL)

5 The attached notice corrects certain inadvertent errors contained in that of the judge.

Decision of the Administrative Law Judge

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
NEW YORK, NEW YORK

Case No. 29-CA-11697

CHELSEA LABORATORIES, INC.

and

KISMATH SOOKNANAN, An Individual

Martha Rodriguez, Esq., for the General Counsel

Martin Gringer, Esq. (Marshall Miller Associates), of Hewlett, NY, for the Respondent.

DECISION

Statement of the Case

ELEANOR MACDONALD, *Administrative Law Judge*: This case was tried in Brooklyn, New York on 28 October 1985. The complaint alleges that Respondent, in violation of Section 8(a)(1) of the Act, discharged its employee Kismath Sooknanan because he engaged in concerted activity by protesting the announcement of a wage increase and in order to discourage employees from engaging in protected concerted activities.

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed in January, 1986, by Respondent and General Counsel, I make the following:

Findings of Fact

I. Jurisdiction

Respondent, a New York corporation with an office and plant in Inwood, Nassau County, New York, manufactures, sells and distributes pharmaceutical and related products. Respondent annually purchases goods in excess of $50,000 in interstate commerce. Respondent admits, and I find that it is an employer engaged in interstate commerce within the meaning of Section 2(2), (6) and (7) of the Act and that Local 918, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. The Facts

The facts in this case are not open to serious dispute. Indeed, a careful reading of the testimony shows that the witnesses did not contradict each other in most respects.

For a number of years, Local 918 had represented the employees of Respondent. In September, 1984, shop steward Jose Velez asked Kismath Sooknanan, the Charging Party herein, to serve on the employee negotiating committee.[1] Soon after this at a meeting attended by about 6 employees, Velez stated that Local 918 was not representing the employees properly, and it was decided to file a decertification petition.

On 30 November 1984, a decertification election was held at which Sooknanan acted as an observer for the petitioner. The majority voted to decertify Local 918 and the Union filed objections to the election.

While the objections were pending, Velez and Sooknanan heard that there was a problem concerning overtime in the packaging department in Building 2. They spoke to Len, Respondent's vice president for operations, who told them that the company needed the employees to work overtime. Len

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1 Sooknanan had been employed by Respondent since March, 1979.

asked Velez and Sooknanan to persuade the employees to work overtime. Then the three men began discussing the decertification proceedings. Velez and Sooknanan asked Len if management would recognize Local 815 after the decertification of Local 918 became final. Len did not know but he promised to bring the matter up at a forthcoming meeting of the Board of Directors of Respondent. Velez and Sooknanan spoke to the workers in Building 2; Velez told the employees to be patient until the objections were decided and Local 815 could begin representing them. Velez said that the company had not harmed the workers but that Local 918 had represented them poorly. Then Sooknanan spoke. He reminded the employees that he was a long service worker; he said he trusted Len to be fair and he asked the employees to continue working overtime. The employees complied with the request. On 7 December 1985, the employees received a letter from the president of Rugby Laboratories thanking them for rejecting representation by any union.[2] The letter informed the employees that they were now covered by Respondent's insurance plans and that, "In the near future, you will be getting more specific information as to what your wage increase will be."

Sometime in December, the employee committee went to speak to Nat Getrajdman, the President of Respondent, about their request that Respondent recognize Local 815. Len and plant manager Lederman joined the group. The committee asked Getrajdman if Respondent would recognize Local 815 when Local 918 was decertified. Getrajdman said he could not give an answer but he promised that there would be a "dialogue" before any decision was made. Sooknanan said the people were dissatisfied because they had been promised a raise but had not gotten it. Some other job related concerns were discussed. Getrajdman assured the committee members that he would speak to them before a decision was made and "that his doors are always open and anyone could come in at any time and speak to him."

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2 Respondent is a division of Rugby Laboratories.

At the 3pm break that day, Velez and Sooknanan met with the employees and related their conversation with Getrajdman. Velez told the people that they should have patience.

A few days later, Sooknanan went to see Getrajdman in his office to explain his position. He said he was helping the employees for humanitarian reasons; the people had complained about Local 918 and he was trying to help them. The two men assured each other that they both had the best interests of the company and the employees at heart and then they shook hands.

In early February, some employees told Sooknanan that they had heard that the objections had been overruled. Sooknanan asked Getrajdman about this, but the latter did not know and said he would find out. A few days later, Suresh, a supervisor in the compression department, told some employees that Local 918 had appealed to Washington and that there would be no raise until the appeal was decided. In fact, the Regional Director for Region 29 had recommended on 25 January 1985 that the objections be overruled; Local 918 filed exceptions to the Regional Director's report on 6 February 1985.

On 19 February, the employees received another letter from the president of Rugby Laboratories telling them that they would receive an immediate wage increase retroactive to 14 December 1984. The letter referred to other working conditions and stated that the employees had decided "to join the over eighty (80%) percent of the workforce in the United States that is non-union." Sooknanan did not understand why Respondent had granted a raise after informing the employees that it would not do so until the Union's objections had been ruled upon in Washington. Employee Mary Giannone asked Sooknanan about the situation. She had also understood that no raise could be granted until the decertification proceeding was settled. She wanted to know if Local 918 was out, if Local 815 was in or if Chelsea was going non-union.

According to Sooknanan, he and Velez went to Getrajdman's office. Velez asked about the letter and Getrajdman said that he knew about the letter. Sooknanan said that Getrajdman had promised to have a dialogue before a decision was made.

Getrajdman responded, "whatever the letter says, that is what is going to be." Then Sooknanan asked, "what are you trying to do, push things down people's throats?" Getrajdman responded that he didn't want to speak to any one from the Union committee. Sooknanan asked why he had not said that in the first place. By this time, both men had raised their voices, and Getrajdman said, "you cannot speak to me that way, I'm the President." He then told Sooknanan that he was fired. He said, "I have witnesses, you can't speak to me that way." Getrajdman then told Velez, "to watch how he spoke around this place and watch who he spoke to."

On cross-examination, Sooknanan acknowledged that when he confronted Getrajdman he was not protesting the fact that Respondent had granted a raise while Local 918's objections were pending in Washington. Sooknanan stated that he wanted to get "clarification". Sooknanan was confused because Respondent had told its employees that no raise would be granted until a decision on the objections had been rendered. In his mind, this was connected to Respondent's promise to engage in a dialogue before it made a decision whether to recognize Local 815, because the recognition decision was also to be made after the decision on objections. Sooknanan believed that the granting of a wage increase showed that everything was "final" and that "the company did not recognize anybody." Sooknanan believed that this constituted a breach of the commitment to talk to the people before reaching a decision on recognizing Local 815. He was surprised that Getrajdman, "a man of integrity," had not fulfilled his promise.

Getrajdman's version of the meeting does not contradict Sooknanan's in any material fashion. According to Getrajdman, after he had acknowledged that he knew about the letter, Sooknanan said, "you cannot do this, it's illegal." Getrajdman responded that granting the raise was not illegal and that the company would stick to its decision. According to Getrajdman, Sooknanan then "became very upset (and) started screaming at me." Getrajdman told him twice not to raise his voice "that I was the president of the company and I didn't

have to take it," but Sooknanan did not let him finish. At that point, Getrajdman fired Sooknanan.

After Getrajdman testified, Sooknanan denied saying the wage increase was illegal.

Where the accounts given by Getrajdman and Sooknanan differ, I shall credit Sooknanan. Sooknanan had a better recollection than did Getrajdman; the latter was not able to testify in as much detail as Sooknanan and he admitted that he could not recall what Sooknanan's claims were during their meeting. Getrajdman summarized what Sooknanan was saying as, "we have no right to give a raise out and that we promised him—I don't know what. . . ." Getrajdman did not deny that he raised his voice during the discussion.

Various employee warning records of Respondent were introduced into evidence involving warnings for "uncooperative" attitude, pushing a supervisor in anger, and insubordination. The employees warned were not discharged for their misdeeds; the employee who pushed his supervisor was warned that a similar future occurrence might result in suspension or termination.

B. Conclusions

It is clear that Getradjman and Sooknanan had a discussion in which both raised their voices. Sooknanan was complaining because it seemed to him that Getradjman had promised that a "dialogue" would take place before a decision whether to recognize a new local union was made by Respondent. Since Respondent had emphasized that neither the decision about recognition nor the long delayed raise could be granted until the status of Local 918 was finally resolved, the two matters were linked in the employees' minds. Thus, when Respondent sent its letter of 15 February 1985, referring to both a "non-union" workforce and the retroactive raise, it seemed that Respondent had decided not to recognize Local 815 without first engaging in the promised discussions. Indeed, Getrajdman affirmed this view when he said he did not want to speak to a union committee.

Manifestly, Sooknanan was engaging in concerted activities when he asked Getrajdman in the presence of shop steward Velez and on behalf of other employees about the seeming contradiction between Respondent's letter and Getrajdman's earlier promises. Sooknanan did not lose the protection of the Act by raising his voice: Getrajdman also raised his voice and, in contrast to the cases cited by Respondent, Sooknanan did not use obscenity or violence. Further, Respondent's records show employees who push their supervisors in anger are merely warned and not suspended or discharged. Here, all Sooknanan did was to raise his voice.

Respondent makes much of the fact that the complaint alleges that Sooknanan was engaged in concerted activity when he "protested Respondent's announcement that it was granting employees the wage increase." Sooknanan admitted that he was not protesting the wage increase; in fact, he was asking about the letter and protesting the totality of Respondent's conduct in not discussing matters with the employee committee as promised. As Sooknanan testified, the wage increase showed that Respondent had made a final decision about not recognizing Local 815 but had not discussed the matter with the employees beforehand. Getrajdman understood this protest very well—he told Sooknanan that he did not want to speak to the employee committee.

Although the complaint condenses the transaction by describing it as a "protest" about the announcement of a wage increase, it was manifest throughout the instant hearing what Sooknanan's complaint had been, just as it must have been manifest to Getradjman on 19 February 1985. When Getradjman told Sooknanan that he did not want to speak to members of the committee and then fired Sooknanan for continuing to raise the issue, he knew very well that Sooknanan believed he had broken his promise to speak to the employees before any decision was reached about recognizing a union.

Respondent, citing *Emporium Capwell Co.* v *Western Addition Community Organization*, 420 U.S. 50 (1975), urges that Sooknanan was fired because he was insisting that Respondent bargain with one union while another was the certified repre-

sentative. This theory does not fit the facts. Sooknanan was not demanding bargaining over the wage increase nor was Sooknanan demanding that Respondent bargain with Local 815. Rather, he was asking Getrajdman about his promise to discuss the issue of recognition with the employees before any decision was made. This matter of concern to all of the unit employees had been discussed with Respondent over a period of time. The Supreme Court's decision in *Emporium Capwell, supra*, stated that the principle of majority rule was "(c)entral to the policy of fostering collective bargaining" and that any bargaining by a minority group would be in derogation of the majority representative's ability to bargain on behalf of the entire unit. Sooknanan, on behalf of the other employees, was asking Respondent whether it would adhere to its promise that a discussion would take place if Local 918 were decertified. There is no way this inquiry as to Respondent's future actions can be construed as a present demand for bargaining.

Conclusions of Law

1. By discharging its employee Kismath Sooknanan because he engaged in concerted activities, Respondent violated Section 8(a)(1) of the Act.

2. The aforesaid unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that Respondent engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having unlawfully discharged Kismath Sooknanan, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in

F.W. Woolworth Co., 90 NLRB 289 (1950), plus interest as computed in *Florida Steel Corp.*, 231 NLRB 651 (1977).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:[3]

ORDER

The Respondent, Chelsea Laboratories, Inc., its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Discharging any employee for engaging in concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Kismath Sooknanan immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful discharge and notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, time-

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3 If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

cards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility copies in both English and a Spanish translation of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60–consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated: Washington, D.C.
8 May 1986

/s/ ELEANOR MACDONALD
Eleanor MacDonald
Administrative Law Judge

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4 If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX "B"

United States Constitution, Fifth Amendment

No person shall * * * be deprived of life, liberty, or property, without due process of law * * *

National Labor Relations Act, 29 U.S.C. § 157, § 158 (a)(1)

§ 157. Rights of Employees:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3).

§ 158. Unfair labor practices:

(a) It shall be an unfair labor practice for an employer—
(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 . . .

No. 87-668

(2)

DEC 21 1987

JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

CHELSEA LABORATORIES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

CHARLES FRIED
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QUESTIONS PRESENTED

1. Whether petitioner had timely notice of the General Counsel's theory of unfair labor practice liability and a full and fair opportunity to litigate the charge.

2. Whether substantial evidence supports the National Labor Relations Board's finding that petitioner violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), by discharging an employee for engaging in protected concerted activity.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-668

CHELSEA LABORATORIES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-10a) is reported at 825 F.2d 680. The decision and order of the National Labor Relations Board (Pet. App. 11a-16a), including the decision and recommendation of the administrative law judge (Pet. App. 17a-26a), are reported at 282 N.L.R.B. No. 74.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 1987. The petition for a writ of certiorari was filed on October 23, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. For a number of years, and until March 12, 1985, Local 918 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

(Local 918), was the certified bargaining representative of petitioner's employees (Pet. App. 5a; C.A. App. 90). In October 1984, because of employee dissatisfaction with Local 918, Jose Velez, the shop steward, filed a decertification petition with the National Labor Relations Board (Pet. App. 5a). On November 30, 1984, the Board conducted a decertification election in which Kismath Sooknanan, a member of Local 918's employee negotiating committee, served as Valez's observer (*ibid.*). A majority of petitioner's employees voted against continued representation by Local 918 (*ibid.*).

Local 918 filed timely objections to the election (Pet. App. 12a, 18a). While these objections were pending, petitioner's employees received a letter from the president of petitioner's parent corporation thanking them for rejecting union representation, stating that they were now covered by petitioner's insurance plans, and indicating that, "[i]n the near future, you will be getting more specific information as to what your wage increase will be" (*id.* at 12a, 19a). Contemporaneously, Velez and Sooknanan learned that petitioner needed employees to work overtime and offered to attempt to persuade employees to do so (*id.* at 18a-19a). At the same time, however, they asked petitioner's vice-president whether petitioner would recognize Local 815, another Teamsters-affiliated local, after the decertification of Local 918 became final (*id.* at 19a). The vice-president did not know the answer to their question but promised to bring the matter to the attention of petitioner's board of directors (*ibid.*). Sooknanan and Velez then met with the employees, asked them to do the needed overtime work, and told them to await the decertification of Local 918, at which time Local 815 could begin representing them (*ibid.*). The employees agreed to do so (*ibid.*).

Subsequently, in December 1984, representatives from the employee negotiating committee, including

Sooknanan, spoke with petitioner's president, Nat Getrajdman, about their request that petitioner recognize Local 815 after Local 918 was finally decertified (Pet. App. 13a, 19a). During this conversation, Sooknanan also indicated that the employees were dissatisfied because they had not received the wage increase that they had been promised (*id.* at 13a). Getrajdman indicated that he could not provide any answers to the employees' questions, but promised that there would be a "dialogue" before any decisions were made (*ibid.*). Velez and Sooknanan then met with the employees, reported the contents of their conversation with Getrajdman, and told the employees to have patience (*ibid.*).

In early February 1985, a few employees told Sooknanan that they had heard that Local 918's objections had been overruled by the Board (Pet. App. 20a). Sooknanan asked Getrajdman whether the objections had been overruled, but Getrajdman indicated that he did not have an answer (*ibid.*). A few days later, a supervisor told several employees that the objections had in fact been overruled, that Local 918 had filed an appeal, and that there would be no raise until Local 918's appeal had finally been decided (*ibid.*). Nevertheless, on February 19, 1985, petitioner's employees received a letter from petitioner's parent corporation indicating that they would receive a wage increase, effective February 22, 1985, retroactive to December 1984, and that they would become participants in petitioner's profit sharing plan (*ibid.*). The letter also thanked the employees for having decided "to join the over eighty (80%) percent of the workforce in the United States that is non-union" (*ibid.*). In light of petitioner's earlier representations about wage increases and union representation, the letter caused considerable confusion among petitioner's employees (*ibid.*).

Accordingly, Sooknanan and Velez went to Getrajdman's office to inquire about the letter's meaning (Pet.

App. 20a). Velez asked whether Getrajdman knew about the letter, and Getrajdman said that he did (*ibid.*). Sooknanan complained that Getrajdman had promised to hold "a dialogue" before any decision about union representation was made, but Getrajdman answered that, "[w]hatever the letter says, that is what is going to be" (*id.* at 20a-21a). Sooknanan asked, "what are you trying to do, push things down people's throats?" (*id.* at 21a). Getrajdman responded that he did not want to speak to anyone from the employee negotiating committee, to which Sooknanan objected that Getrajdman should have taken that position in the first place (*ibid.*). By this time, both men had raised their voices and Getrajdman said, "you cannot speak to me that way, I'm the President" (*ibid.*). Getrajdman then fired Sooknanan and ordered him out of the office (*id.* at 6a).

2. Sooknanan filed an unfair labor practice charge with the Board, and the General Counsel issued a complaint alleging that Sooknanan's discharge violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) (Pet. App. 14a). The complaint alleged that Sooknanan had been discharged for protesting petitioner's grant of a wage increase while objections to the decertification election were pending, and for engaging in "other concerted activity" (*id.* at 14a; C.A. App. 90, 91).

a. After a hearing, an administrative law judge (ALJ) agreed that petitioner had violated Section 8(a)(1) by discharging Sooknanan (Pet. App. 11a, 24a). The ALJ found that "Sooknanan believed that the granting of a wage increase showed that everything was 'final'[,] * * * that 'the company did not recognize anybody,' " and that this "constituted a breach of the commitment to talk to the people before reaching a decision on recognizing Local 815" (*id.* at 21a). The ALJ further found that, "[m]anifestly, Sooknanan was engaging in concerted activities when he asked Getrajdman in the presence of shop steward

Velez and on behalf of other employees about the seeming contradiction between [petitioner's] letter and Getrajdman's earlier promises" (*id.* at 23a). And the ALJ finally found (*ibid.*) that Sooknanan had been "fired * * * for continuing to raise the issue," that "Sooknanan did not lose the protection of the Act by raising his voice," that "Getrajdman also raised his voice," that, "in contrast to the cases cited by [petitioner], Sooknanan did not use obscenity or violence," and that petitioner's records indicated that "employees who push their supervisors in anger are merely warned and not suspended or discharged."

The ALJ then rejected petitioner's claim that it had not been given notice by the complaint of the General Counsel's theory of violation (Pet. App. 23a; C.A. App. 82, 154). The ALJ found that, "[a]lthough the complaint condenses the transaction by describing it as a 'protest' about the announcement of a wage increase, it was manifest throughout the instant hearing what Sooknanan's complaint had been," to wit, that Getrajdman "had broken his promise to speak to the employees before any decision was reached about recognizing a union" (Pet. App. 23a).

Finally, the ALJ rejected (Pet. App. 23a-24a) petitioner's contention that, because Sooknanan was fired for insisting that petitioner bargain with one union while another was the certified representative of the employees, his conduct was unprotected under this Court's decision in *Emporium Capwell Co.* v. *Western Addition Community Org.*, 420 U.S. 50 (1975). In the ALJ's view, petitioner's contention simply "d[id] not fit the facts" of the case (Pet. App. 24a). She said that "Sooknanan was not demanding bargaining over the wage increase nor was Sooknanan demanding that [petitioner] bargain with Local 815"; "[r]ather, he was asking Getrajdman about his promise to discuss the issue of recognition with the employees before any decision was made" (*ibid.*). She concluded that

"[t]here is no way this inquiry as to [petitioner's] future actions can be construed as a present demand for bargaining" (*ibid.*).

b. The Board adopted the decision and recommendation of the ALJ (Pet. App. 11a-16a). It determined that the facts "which provide the basis for the judge's finding that Sooknanan was engaged in protected concerted activity at the time he was discharged[] were fully litigated at the hearing" (*id.* at 14a) and that petitioner "does not * * * claim that it was precluded from presenting exculpatory evidence, nor does it argue that it would have altered the conduct of its case at the hearing in any particular" (*id.* at 15a). Indeed, the Board noted, petitioner's brief to the Board addressed "the law and the sufficiency of the facts * * * in the record with respect to the protected concerted nature of Sooknanan's protest of the [petitioner's] breach of promise regarding the dialogue" (*ibid.*). Accordingly, "as [it] f[ou]nd that the theory was encompassed in the complaint and that all the operative facts underlying the [Section] 8(a)(1) finding [were] present in the record," the Board rejected petitioner's "argument that variance provides a b[illegible]s for [reversal] in this case" (*ibid.*).

3. The court of appeals upheld the Board's findings and enforced its order (Pet. App. 3a-10a). Initially, the court rejected petitioner's claim that the Board's decision "was based on a theory not contained in the complaint" (*id.* at 7a), reasoning that petitioner "addressed the legal issues [raised by the "dialogue" theory] as early as its first answer to the NLRB's complaint," and that petitioner "did not object to the ALJ's factual findings on review before the Board" and thus could not do so for the first time on appeal (*id.* at 7a-8a).[1] It then found substantial evidence to

[1] The court also rejected (Pet. App. 7a) petitioner's claim that, given timely notice, it would have been able to challenge the factual predicate of the "dialogue" theory – that is, that the employer actually

support the Board's finding (a) that Sooknanan's conduct did not merit discharge for rudeness or insubordination (*id.* at 8a) and (b) that Sooknanan was engaging in "concerted activity" when he met with Getrajdman (*ibid.*). Finally, it rejected petitioner's argument "that Sooknanan's activity, even if concerted, was not protected because Sooknanan's request for a dialogue was an attempt to undermine the existing collective bargaining representative" (*id.* at 9a), emphasizing that Sooknanan "was merely insisting that the employer adhere to its promise to talk with the employees about a new local, after the prior local's decertification process was complete" (*id.* at 10a), and that Sooknanan's activities were not "inconsistent with the existing grievance mechanism" (*ibid.*).

ARGUMENT

The decision below is correct. It does not conflict with any decision of this Court or any other court of appeals. Accordingly, review by this Court is not warranted.

1. Petitioner initially errs in suggesting (Pet. 6-8) that there is a conflict among the circuits as to whether the Board may properly find a violation on a theory that was not expressly pleaded in the complaint. It has long been settled that a failure to plead a theory of violation expressly in the complaint does not preclude the Board from finding such a violation where the respondent has had adequate notice of the charge and an opportunity to litigate the issue fully and fairly. See *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 349-350 (1938); *NLRB* v. *Coca-Cola Bottling Co.*, 811 F.2d 82, 87 (2d Cir. 1987); *NLRB* v. *Int'l Ass'n of Bridge Workers, Local 433*, 600 F.2d 770, 775 (9th Cir. 1979), cert. denied, 445 U.S. 915 (1980); *NLRB* v. *Sunnyland Packing Co.*, 557 F.2d 1157,

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had promised a dialogue. The court observed (*ibid.*) that Sooknanan's belief in the promised dialogue need not have been correct for his inquiry to be concerted and protected under the Act.

1161 (5th Cir. 1977); *J.C. Penney Co.* v. *NLRB*, 384 F.2d 479, 482-483 (10th Cir. 1967). The decisions of the other courts of appeals that petitioner cites are in accord; they simply represent instances in which the responding party did not have either actual notice of the claim or a full and fair opportunity to litigate the claim at the hearing. See *NLRB* v. *Quality C.A.T.V., Inc.*, 824 F.2d 542, 545, 547 (7th Cir. 1987); *NLRB* v. *Complas Industries, Inc.*, 714 F.2d 729, 734 (7th Cir. 1983); *Soule Glass & Glazing Co.* v. *NLRB*, 652 F.2d 1055, 1102-1106 (1st Cir. 1981); *NLRB* v. *Homemaker Shops*, 724 F.2d 535, 542-544 (6th Cir. 1984); *Stokely-Van Camp, Inc.* v. *NLRB*, 722 F.2d 1324, 1331 n.11 (7th Cir. 1983); *NLRB* v. *Blake Construction Co.*, 663 F.2d 272, 279-282 (D.C. Cir. 1981); *NLRB* v. *Pepsi-Cola Bottling Co.*, 613 F.2d 267, 273-274 (10th Cir. 1980); *Drug Package, Inc.* v. *NLRB*, 570 F.2d 1340, 1345 (8th Cir. 1978).[2] In this case, of course, petitioner

[2] Thus, in *Quality C.A.T.V., Inc.*, 824 F.2d at 547, the court found that the issue of protest because of discomfort, as opposed to unsafe conditions, was not "fully and fairly litigated"; in *Stokely-Van Camp*, 722 F.2d at 1331-1332, the court, in dictum, found that the respondent was not informed of an unpleaded charge in time to prepare a defense; in *Soule Glass & Glazing Co.*, 652 F.2d at 1102, the court found that the respondent had not been on notice during the hearing of certain unpleaded charges and that the deficiency could not be overcome after the hearing's close by arguments in the General Counsel's brief; in *Homemaker Shops*, 724 F.2d at 544, the court found that amendment of a complaint just prior to the Labor Day weekend did not give the respondent a fair opportunity to locate, interview, and secure attendance of witnesses, and in the circumstances, the allegation was not fully and fairly litigated; in *Blake Construction Co.*, 663 F.2d at 282, the court found that the General Counsel had not made clear his theory of the case and the respondent did not actually litigate his defenses; and in *Drug Package, Inc.*, 570 F.2d at 1345, the court found that the unalleged violation was not fully litigated because the respondent was unaware of the possibility of the retroactive remedy that would flow from it.

was aware of the theory of violation well before the hearing commenced and had a full and fair opportunity to present its defenses to the charge (Pet. App. 7a). Thus, the decision below is consistent with all prior precedent.

2. Petitioner's remaining contentions raise only evidentiary issues that do not warrant review by this Court. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). Petitioner's assertion (Pet. 9-12) that Sooknanan's conduct constituted "personal griping" merely takes issue with the Board's finding, upheld by the court of appeals, that Sooknanan was acting on behalf of other employees (Pet. App. 8a, 11a, 23a-24a). Likewise, petitioner's suggestion (Pet. 12-13) that Sooknanan's allegedly rude response to Getrajdman should not be protected only quarrels with the Board's finding, upheld by the court of appeals, that Sooknanan was not acting independently or in derogation of the bargaining relationship (Pet. App. 8a-11a, 23a-24a). Finally, petitioner's claim (Pet. 13-15) that the decision below is at odds with this Court's decision in *Emporium Capwell Co.* v. *Western Addition Community Org.*, 420 U.S. 50, 61-70 (1975), which held that employee attempts to bypass a certified union and bargain over the terms and conditions of employment violate the statutory principle of majority rule and thus are not protected by Section 7, 29 U.S.C. 157, is incorrect for the same reason: the Board found, and the court of appeals agreed, that Sooknanan had made no present demand for bargaining or recognition and that his request for a discussion in the event of decertification was not destructive of the old union's status (Pet. App. 10a, 24a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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